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In The

Supreme Court of the United States

October Term, 1997

CITY OF OXNARD; CHIEF HAROLD HURTT, individually and as Chief of Police; STAN MEYERS, individually and as Assistant Chief of Police; TOM CADY, individually and as Assistant Chief of Police; JOHN CROMBACH, individually and as Commander; BILL LEWIS, individually and as Sergeant; and DANIEL CHRISTIAN, individually and as Sergeant,

Petitioners,

vs.

JENNIFER JENSEN, individually and as Administrator of the Estate of JAMES REX JENSEN, JR., deceased; LINDSEY ELIZABETH JENSEN and KATELYN MELISA JENSEN, minors, by and through JENNIFER JENSEN as Guardian ad Litem,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Ninth Circuit creating a new constitutional tort for a police officer injured in the line of duty conflicts with the opinion of the United States Supreme Court in *Collins v. Harker Heights*, 503 U.S. 115 (1992), in which the Court refused to create such a constitutional tort for a public employee to sue his employer in federal court for deliberately indifferently subjecting him to a greater degree of the same kinds of risks routinely inherent in his chosen employment?

2. Whether the protections of the Fourth Amendment extend to a public employee injured by another public employee employed by the same city while implementing government operations?

3. Whether public employees who injure each other while implementing government operations may pursue a Section 1983 action, thereby allowing double recovery and introducing traditional state workers' compensation-type actions into federal court?

4. Whether the Ninth Circuit decision disturbs traditional roles of federalism in allocating the functions of federal and local government?

5. Whether the common-law tort doctrine of transferred intent is available in a Section 1983 action to transform what would otherwise be a garden-variety negligence case into a federal action?

6. Whether the Ninth Circuit decision is consistent with the principles set forth by this Court in the recent decision of *County of Sacramento v. Lewis*, ___ U.S. ___,

118 S.Ct. 1708 (1998) (which held that a deliberately indifferent police action which terminated the movement of an individual with whom the officer did not intend to interfere was not constitutionally cognizable)?

PARTIES TO THE PROCEEDING

The names of all parties to this proceeding in the United States Supreme Court appear in the caption of the case. There i no parent or subsidiary company of any party to be listed.

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Appendix A — Opinion of the United States Court of Appeals for the Ninth Circuit Filed May 28, 1998 . . . . . 1a

Appendix B — Order of the United States Court of Appeals for the Ninth Circuit Denying the Petition for Rehearing Filed July 20, 1998 . . . . . 20a

Appendix C — Order of the United States District Court for the Central District of California Denying Motion to Dismiss Filed June 26, 1997 . . . . . 22a

Petitioners, the City of Oxnard, Chief Harold Hurtt, Assistant Chief Stan Meyers, Assistant Chief Tom Cady, Commander John Crombach, Sergeant Bill Lewis, and Sergeant Dan Christian, respectfully request a petition for writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") is reported at *Jensen v. City of Oxnard, et al.*, 145 F.3d 1078 (9th Cir. 1998) (App. A). The United States District Court for the Central District of California ("district court") did not issue an opinion or explanation of ruling.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit was entered on May 28, 1998. The Ninth Circuit denied a timely petition for rehearing (and suggestion for rehearing *en banc*) on July 20, 1998. The Ninth Circuit granted the petitioners' motion to stay mandate pending presentation of this petition for writ of certiorari for 30 days from August 12, 1998.

This petition presents a pure question of law, on generally agreed-upon material facts. Petitioners contend that respondents failed not only to allege the violation of a constitutional right that was clearly established at the time of the acts in question, but also failed to establish the violation of any constitutional right at all. *Siegert v. Gilley*, 500 U.S. 226, 233 (1991). Because the threshold component inquiry of the qualified immunity analysis is implicated, interlocutory appellate jurisdiction is permissible. *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); 28 U.S.C. § 1291.

The jurisdiction of this Court is also invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "No state shall . . . deprive any person of life, liberty or property, without due process of law."

The Fourth Amendment to the United States Constitution provides in relevant part that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

In relevant part, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Contrary to the opinion of the Ninth Circuit, petitioners assert that the Fourth Amendment is not intended to prohibit government from injuring its employees during the implementation of municipal law

enforcement operations. The Fourth Amendment recognizes two categories of persons, "the people" and, implicitly, the government, and protects the former from the latter's unreasonable actions. This Court clarified the scope of the protected class of "the people" under the Fourth Amendment by referring to seizures "of a free citizen." *Graham v. Connor*, 490 U.S. 386, 394 (1989).

In *Collins v. Harker Heights*, 503 U.S. 115, 127 (1992), this Court cited with approval the Seventh Circuit opinion in *Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir. 1986), which stated:

> [T]he bill of rights is a charter of negative liberties . . . . The bill of rights is designed to protect people from the state, not to ensure that the state supplies minimum levels of safety or comfort.

In *Collins*, this Court concluded that a municipal employee who was carrying out his government mission at the time of his accidental injury had no constitutional right under which his heirs could successfully maintain suit against the employing municipal corporation. The Court reasoned that the employee was injured by a peril endemic in his chosen occupation. The case was dismissed despite the fact that the complaint alleged that the municipality magnified the types of risks involved by ignoring prior warnings and state law.

Petitioners contend that *Collins* is a barrier to a civil suit pursuant to Section 1983 in circumstances where a public employee has agreed to a job function which involves routine exposure to a certain kind of risk and the employee is physically injured by the types of perils inherently contemplated by the job. In such a case, the public employee is acting as the government. The Fourth

Amendment, applied to the states through the Fourteenth Amendment, does not protect government from itself when government is acting as such in the implementation of its operations. In those circumstances, the public employees are not "free citizens."

In the present case, the respondents' decedent, Officer James Jensen ("Jensen"), was a City of Oxnard ("Oxnard") police officer who had volunteered for service with the SWAT team. During SWAT operations, Jensen was mistaken for an armed suspect and was shot by another SWAT officer.

On February 19, 1997, respondents filed their complaint in the district court alleging violations of Section 1983 by petitioners. Paragraph 9 of the complaint alleges that decedent and another officer, Sergeant Dan Christian, were police officers employed by Oxnard and were members of the SWAT unit.

Paragraph 15 of the complaint alleges that on March 13, 1996, at approximately 6:00 a.m., the Oxnard Police Department SWAT unit conducted a raid on a two-story townhouse in Oxnard for the purpose of serving a search warrant. As part of the SWAT operations, Jensen threw a flash-bang grenade from the staircase onto the second-floor landing.

Paragraph 16 of the complaint alleges that, thereafter, Jensen and other SWAT officers, including petitioner Sergeant Christian, ascended the staircase to the second floor. As Jensen entered a bedroom for the purpose of conducting a search, Sergeant Christian mistook Jensen for a gun-wielding occupant of the residence and shot and killed him.

On April 22, 1997, petitioners filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

Respondents filed opposition to the dismissal motion on May 1, 1997, contending at page 5, lines 18 through 21 thereof, that "Defendants admit that 'in the turmoil of events, Oxnard Sgt. Dan Christian mistook decedent for a gun-wielding occupant of the premises and shot him to death.' This mistake gives rise to liability for constitutional violations because Sergeant Christian was clearly intent on the seizure of the plaintiffs' decedent."

On May 19, 1997, the district court denied the motion to dismiss, without explanation. The district court filed its order denying the motion to dismiss on June 26, 1997.

On June 26, 1997, petitioners perfected their appeal. All parties filed briefs in the Ninth Circuit, and oral argument before the panel occurred on February 5, 1998. On May 28, 1998, the Ninth Circuit, in a published opinion, affirmed the denial of the motion to dismiss.

On June 11, 1998, petitioners petitioned the panel for rehearing and suggested rehearing *en banc*. On July 20, 1998, the panel denied the petition for rehearing and rejected the suggestion for rehearing *en banc*. On August 12, 1998, the Ninth Circuit granted petitioners' motion to stay mandate pending the filing of this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE FOURTH AMENDMENT IS INTENDED TO PROTECT FREE CITIZENS FROM GOVERNMENT, NOT TO PROHIBIT GOVERNMENT FROM INJURING A PUBLIC EMPLOYEE IN THE IMPLEMENTATION OF MUNICIPAL LAW ENFORCEMENT OPERATIONS.

Until the published decision in this case, no federal court has ever construed the Fourth Amendment to authorize a private right of action for damages in favor of one police officer against another and the employing public entity for physical injury while implementing the operations of government. In properly limiting the scope of the Fourth Amendment, this Court has emphasized that the Fourth Amendment applies "where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a *free citizen* . . ." (emphasis added). *Graham v. Connor*, 490 U.S. 386, 394 (1989). In the same opinion, this Court emphasized the primacy of textual construction and eschewed any generic excessive force standard.

Contrary to state tort law, status does matter in federal constitutional analysis. Whether or not a person is a trespasser in another person's home does not matter for purposes of suing the homeowner for a dangerous condition. But the United States Constitution, in contrast, is a document of limited application.

This Court's opinions have previously identified classifications of persons exempted from the protection of various constitutional amendments. For example, this Court has held that certain provisions of the Bill of Rights

do not apply to protect certain groups of persons. One category is school children.

In *Vernonia School District v. Acton*, 515 U.S. 646 (1995), this Court held that school children have a lesser privacy expectation with regard to physical and medical examinations and procedures than does the general population. This Court concluded that, consonant with the Fourth Amendment, students participating in athletic events could be required to undergo drug testing by compelled urine samples without probable cause to believe that drugs had been taken.

Another illustration of this Court's conclusion that school children, as a class of persons, enjoy substantially less constitutional protection than do other classes of persons is found in *Ingraham v. Wright*, 430 U.S. 651 (1977). In that case the Court held that school children could be excluded from the protections of the Eighth Amendment's proscription of cruel and unusual punishment and from the Fourteenth Amendment's substantive due process clause.

The Court held that students can be significantly beaten with no constitutional redress while hardened criminals suffering the same beatings at the hands of their jailers would have a valid claim for constitutional redress under the Eighth Amendment. The Court reasoned that the amendments cannot be wrenched from their historical and traditional contexts. Petitioners assert that these opinions, which hold that the status of "student" results in fewer constitutional protections than for other members of society, warrant the conclusion herein that a police officer's status limits his or her constitutional protections in certain circumstances.

The importance of textual exegesis is emphasized by the Court's decision in *Graham v. Connor*:

> The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized excessive force standard.

The Fourth Amendment protects citizens from a repressive government. There is nothing in the Fourth Amendment or in federal court decisions interpreting it which reflect a judicial concern with government accidentally injuring itself. This Court has stated:

> Since it is surely far more clear from the language of the Fourteenth Amendment that life is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under 1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under color of law establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the

> adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us that they do not support the construction urged by respondent.

Paul v. Davis, 424 U.S. 693, 698-699 (1976).

The recent opinion in *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) [*en banc*], illustrates that for purposes of constitutional analysis, status does matter. The Fourth Circuit held that the Fourth Amendment did not extend protection from excessive force to pretrial detainees even though the arrest of the pretrial detainee in that case occurred only two hours earlier. Because of the plaintiff's status as a pretrial detainee, the *en banc* Fourth Circuit held that claims of excessive force must be governed by the due process clause of the Fourteenth Amendment rather than by the Fourth Amendment. 115 F.3d at 1166. The Fourth Circuit identified the "textual" analysis of the various amendments as fundamental. 115 F.3d at 1164.

This Court has emphasized that the threshold inquiry in qualified immunity analysis is whether the Constitution does or does not grant the right in issue. In *Siegert, supra*, 500 U.S. at 232, this Court explained that a necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is clearly established at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.

A resolution of this purely legal question permits the trial court to expeditiously weed out suits which do not merit constitutional protection without requiring a public entity defendant to engage in expensive and time-consuming preparation to defend the suit on the merits. The Court concluded:

> We think the Court of Appeals should not have assumed, without deciding, this preliminary issue in this case nor proceeded to examine the sufficiency of the allegations of malice.

500 U.S. at 232.

The Ninth Circuit decision in the present case does not grapple with this issue at all. There is no textual analysis of the Fourth Amendment by the Ninth Circuit to determine whether decedent's status as a police officer, voluntarily engaged in implementing SWAT operations, distinguished him from the "free citizen" identified as the beneficiary of Fourth Amendment protection in *Graham v. Connor* (490 U.S. at 394). Instead, the Ninth Circuit relied upon an inapposite decision from the United States Court of Appeals for the District of Columbia.

The Ninth Circuit erroneously concluded that *Graham v. Davis*, 880 F.2d 1414 (D.C. Cir. 1989), warranted a dismissal of petitioners' motion in the instant case. The court characterized that opinion as allowing an officer to bring an excessive force Section 1983 action against other officers based upon an altercation with those officers following a completed arrest.

The facts of *Graham v. Davis*, however, are wholly inapposite to the instant case. In *Graham v. Davis*, the police were not carrying out any government operations. Therefore, government was not seizing government; rather, because there was no joint function involved, government was seizing a private citizen.

In *Graham v. Davis*, a plainclothes police officer had "subdued [a suspect]" by handcuffing and sitting on him. The officer "canceled his request for police

assistance." Another plainclothes officer, who did not know that the plaintiff was a police officer, "suddenly seized [the plaintiff] by the right shoulder from behind . . . and then struck him on the head" for no reason which anyone could ever figure out. Because no government operations were being implemented when Officer Davis used excessive force, the plaintiff was seized in his capacity as a free citizen.

This is not to say that when a police officer is not implementing government operations, and the officer's rights are violated by the police department, that the officer does not have the same right as any free citizen would to sue. An example is in the facts of *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992), a decision relied upon by the Ninth Circuit.

In *Jackson*, the Court held that a police officer compelled by his employing police department to give a urine sample despite the absence of probable cause had the same right as a free citizen to sue for illegal seizure. Officer Jackson, however, was not acting as a police officer when he was unconstitutionally seized, nor was he implementing any operations of government.

The officers in *Graham v. Davis* were unknown to each other and were not implementing any government operations when one suddenly attacked the other. The officers had never worked together in subduing the suspect. When the second police officer hit the plaintiff, he was not injuring government but, rather, was striking a private citizen who, having completed the arrest, was no longer functioning as an agent of government.

A second major difference between the instant case and the *Graham v. Davis* case is the defense raised by the defendants. The *Graham v. Davis* defendants argued that neither officer should be able to recover against each other

on their constitutional claims because mutual excessive force cases cancel each other out. Those defendants argued that mutual combatants who voluntarily engage in an altercation may not recover damages from each other. Those defendants argued that, like professional boxers who consent to be injured by consenting to combat, a police officer who had ceased to act in that capacity consented to be injured.

The petitioners do not present such a defense, which is adapted from British common law. The petitioners contend that the text of the Fourth Amendment does not protect government from government but, rather, only protects the people (including government employees when they cease to act as such) from government.

The petitioners assert that this Court's decision in *Collins* correctly found no constitutional right in favor of municipal employees injured by their employer's deliberate indifference in magnifying risks already inherent in the chosen occupation. Just as the *Collins* sewer worker's chosen occupation exposed him to known routine hazards, so also do police officers select a line of work whose implementation involves routine exposure to bullets and batons.

There are three good reasons for this Court to interpret the Fourth Amendment to protect free citizens as opposed to public entity employees acting as part of government. First, we cannot disregard or minimize the fact that, like the sanitation worker in *Collins* and the prison guard in *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986), police officers enter into their duties voluntarily and with full knowledge of the possible dangers faced by law enforcement personnel. Even more than the sanitation worker in *Collins*, a police officer's job involves routine exposure to danger. He or she is implicitly aware of the substantial risk of harm faced

daily. *Hartman v. Bachert*, 880 F.Supp. 342, 351 (E.D. Pa. 1995).

Second, concern for the welfare of public employees long ago resulted in the adoption of a comprehensive administrative system which has been in place in every state since 1913. This system is the workers' compensation system, which guarantees swift and certain recovery for workplace injuries. *United States Borax v. Superior Court*, 167 Cal.App.3d 406, 411 (1985). For example, in addition to several hundred thousand dollars in automatic death benefits, police officers receive enhanced benefits under the California Labor Code, including presumptions of compensability for various conditions, so-called Section 4850 time for temporary disability (full salary tax free for up to one year), and free scholarships for children when an officer is killed in the line of duty. Cal. Lab. Code §§ 4702 and 4709.

Finally, the sheer volume of constant contacts between police officers implementing government operations makes the Ninth Circuit's decision a sure font of unending tort litigation in federal court. Officers work together daily in difficult and demanding situations. The affirmation of the Ninth Circuit opinion which inappropriately creates a constitutional cause of action for public employees would vastly multiply the potential for Section 1983 actions. These actions, if pursued, will transform federal courts into workers' compensation tribunals and circumvent state programs to respond to employees injured at work.

II.

THE NINTH CIRCUIT OPINION IGNORES THE PROPER ROLE OF STATE GOVERNMENT IN A FEDERAL SYSTEM.

Petitioners contend that the Ninth Circuit opinion ignores the proper role of the states in a federal system. This Court has always respected the role of state governments in a federal system. In one opinion, this Court stated:

> The doctrine that the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it . . . relied on by Mr. Justice Brandeis in his well-known concurring opinion in *Ashwander v. T.V.A.*, . . . is a well-settled doctrine of this Court which, because it carries a special weight in maintaining proper harmony in federal-state relations, must not yield to the claim of the relatively minor inconvenience of postponement of decision.

Clay v. Sun Insurance, 363 U.S. 307, 211-212 (1960).

More recently, this Court has again expressed deference under principles of federalism to valid and functioning state administrative tribunals, such as workers' compensation systems, which adjudicate similar and parallel rights to those vindicated by the constitutional process. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986).

A proper regard for the role of state administrative tribunals which are well established in every state and guarantee substantial monetary and other recovery for injured workers will preserve the balance of federal-state spheres of authority. As this Court has cautioned in *Collins*, 503 U.S. at 128:

> The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship.

Three cases decided in 1986 acknowledged the workers' compensation system as providing an acceptable alternative forum for public employees accidentally injured in the course of their employment. These decisions are: *Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) [prison guard savagely beaten by prisoner due to unsafe reformatory conditions held not to have Section 1983 action against employer for reckless failure of state officials to remedy prison conditions]; *McClary v. O'Hare*, 786 F.2d 83, 87 (2d Cir. 1986) [recklessness of public entity employee in operating mobile truck crane, causing crane's boom to fall and strike co-worker in head, "however tragic," was adequately addressed by exclusive remedy provisions of state workers' compensation laws]; *Hayes v. Vessey*, 777 F.2d 1149 (6th Cir. 1986) [plaintiff teacher in state prison tragically raped due to deliberate indifference of institution in ignoring high levels of sexual tension within prison and failing to provide any security for female employees while assigning them to work among inmates in remote areas held random and unpredictable and adequately addressed by state workers' compensation tribunals].

III.

COLLINS ESTABLISHES THAT EVEN IF OXNARD DELIBERATELY INDIFFERENTLY INFLICTED INJURY UPON ITS EMPLOYEE ENGAGED IN LAW ENFORCEMENT OPERATIONS, THAT CONDUCT IS NOT CONSTITUTIONALLY REDRESSABLE.

In *Collins*, the complaint alleged that a widow's husband had a constitutional right to be protected from the city's custom of deliberate indifference toward the safety of its employees. The city had allegedly violated that right by not training its employees about the dangers of working in sewer lines, not providing safety equipment at job sites mandated by Texas law, and not providing safety warnings. The complaint also identified a prior incident which had given the city notice of the risks of entering the sewer lines, and the city intentionally failed to provide the equipment and training. The city moved to dismiss and the district court granted the motion.

This Court held that a municipal corporation's deliberate indifference in allegedly sending a municipal employee to his death was not constitutionally redressable because "petitioner cannot maintain, however, that the city deprived Collins of his liberty when it made, and he voluntarily accepted, an offer of employment." 503 U.S. at 128. The *Collins* court cited with approval the Seventh Circuit opinion in *Walker*, *supra*.

In *Walker* the court found that the complaint of injured prison guards and the estates of some deceased guards against their employer stated no claim because the Constitution does not assure safe working conditions for public employees despite numerous acts of recklessness on the part of the public employer. The Seventh Circuit stated:

> The Bill of Rights is designed to protect people from the State, not, to ensure that the State supplies minimum levels of safety or comfort. . . . The State must protect those it throws into snake pits, but the State need not guarantee that volunteer snake charmers will not be bitten. It may not throw Daniel into the lion's den, but if Daniel chooses to be a lion tamer in the State's circus, the State need not separate Daniel from his charges with an impenetrable shield.

Petitioners assert that the *Walker* principles warrant the granting of their motion to dismiss herein.

IV.

THE NINTH CIRCUIT OPINION WOULD CONVERT FEDERAL COURTS INTO WORKERS' COMPENSATION APPEALS BOARDS.

The Ninth Circuit decision is not limited to a police officer shooting another police officer. Now, if the opinion is permitted to stand, any time there is an alleged seizure, one public employee can sue the other in federal court, claiming a violation of Section 1983 rights through the Fourth Amendment. The number of circumstances in which one officer can be attempting to apprehend a suspect and accidentally injure his or her partner is limitless.

The California Supreme Court, for example, has recently published a decision entitled *Calatayud v. State*, 98 Daily Journal D.A.R. 8527 (1998). In that case, two officers were grappling with a suspect. One officer was holding a shotgun which accidentally went off, seriously

injuring another officer. Had the other officer simply alleged that these acts constituted a reckless seizure, as the present respondents have, he too could have been in federal court suing for damages.

As one district court has observed, "Although it could be argued that Section 1983 litigation is already at flood stage, there appears to be no valid reason to open yet another dam." *Broadnax v. Webb*, 892 F.Supp. 188, 190 (E.D. Mich. 1995). Public entity employees volunteer to do a dangerous job in exchange for a certain level of importance, compensation, benefit packages, and sense of public duty. To convert the federal courts into glorified administrative tribunals adjudicating workplace conditions between employer and employee would deluge an already overburdened federal court system.

V.

THE POTENTIAL COST TO PUBLIC ENTITIES OF ALLOWING DOUBLE RECOVERY THROUGH THE WORKERS' COMPENSATION SYSTEM AND THE FEDERAL CIVIL RIGHTS SYSTEM IS STAGGERING.

California law provides strict liability for five categories of benefits for injured workers, regardless of fault or the percentage of work-related causation. These are permanent disability, temporary disability, vocational rehabilitation, unlimited lifetime medical care, and death benefits (cash to survivors, burial expenses, and college education for dependent heirs).

For municipal corporations with hundreds of thousands of law enforcement personnel in daily danger of accidental death or injury at the hands of fellow officers, the magnitude of financial exposure is staggering. Every time an officer recklessly swings a baton at a suspect and

accidentally strikes his or her partner, the public entity pays workers' compensation benefits.

However, after the Ninth Circuit decision, the public employer may also have to pay for defense attorneys' fees, expert witness fees, and costs in defending a Section 1983 action. In addition, the public entity may have to pay plaintiffs' attorneys' fees, expert witness fees and costs under Section 1988, plus, of course, unlimited financial indemnity to the physically injured officer or his heirs. Such indemnity will likely be imposed by a sympathetic jury (facing an injured law enforcement officer or his widow and children) with the 20/20 vision of hindsight. Petitioners contend that the Ninth Circuit has opened a Pandora's box of benefits which could potentially rupture the already under-funded public treasury.

VI.

THE NINTH CIRCUIT OPINION HAS CONSTITUTIONALIZED THE COMMON LAW OF TORTS WITHOUT CAUSE.

The Ninth Circuit's opinion borrowed from the common law of torts and applied the doctrine of transferred intent. This Court has cautioned against federalizing the common law of torts.

At common law, if a person intended to injure a third person but accidentally struck the plaintiff, the intent transferred over to supply the requisite *mens rea*. Because Sergeant Christian did not specifically intend to harm his partner, Jensen, the only way the Ninth Circuit could find liability was to dip liberally into tort law.

Now nothing is left of the distinction between the common law of torts, which requires only an intent to do the act as opposed to an intent to do the proscribed

consequence, and federal search and seizure law, which heretofore defined "intent" in the appreciably stricter criminal law sense of specific intent. The Ninth Circuit's cross-breeding has engrafted elements of the common law onto the Fourth or Fourteenth amendments, which makes them unrecognizable as such.

This Court's recent decision in *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S.Ct. 1708 (1998), prohibits the result reached by the Ninth Circuit. *Lewis* establishes that when the police try very hard to apprehend a suspect but deliberately indifferently control an unintended third party, who is seriously injured thereby, there is no Fourth Amendment seizure. *Lewis* specifically stands for the proposition that attempted but failed seizures of one person resulting in the unintended seizure of another are beyond the scope of the Fourth Amendment. *Lewis*, 118 S.Ct. at 1715.

In the *Lewis* case, the pursuing officer intended to terminate the movement of the fleeing motorcyclist but did not intend to control, terminate the movement of, or seize the motorcyclist's passenger; therefore, there was no Fourth Amendment seizure. Similarly in the present case, Sergeant Christian never intended to control, terminate the movement of, or seize Jensen, his partner.

Because there was no intended seizure, and *Lewis* prohibits the borrowing of the common-law doctrine of transferred intent, the instant facts must be analyzed under the Fourteenth Amendment. Liability is precluded under the rationale of *Lewis* because the high degree of culpability required for liability under the Fourteenth Amendment by definition from *Lewis* cannot be present where a law enforcement officer is attempting to seize a criminal suspect.

CONCLUSION

The facts of the instant case are tragic. Law enforcement personnel deserve the deepest admiration and gratitude for the protections which they provide daily. It is a sorrowful day when an officer is killed in the line of duty. *Hartman v. Bachert*, 880 F.Supp. at 351, 352. But as the Fourth Circuit stated *en banc*:

> It is always easy to second-guess. Tragic circumstances only sharpen our hindsight, and it is tempting to express our sense of outrage at the failure of an officer to act properly.

Pinder v. Johnson, 54 F.3d 1169, 1178-1179 (4th Cir. 1995) [*en banc*].

The Fourth Amendment was intended, as its text indicates and as *Graham v. Connor* construes it, to protect a class of persons known as "the people" or "free citizens." Employees of government implementing its operations, such as decedent, do not fall within that protected status.

As the Court concludes in *Collins v. Harker Heights*, public entity employees who agree to work in dangerous circumstances, and are injured or killed under those circumstances through exaggerated misconduct of their co-employees or employer, do not have a constitutional right of redress. Their remedy instead lies at state law:

> The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal

> Constitution, generally governs the substance of the employment relationship.

Collins v. Harker Heights, 503 U.S. at 128.

The Ninth Circuit's opinion now opens the federal courts to every officer accidentally — but allegedly deliberately indifferently — injured by his or her partner while trying to subdue or restrain a suspect. The fiscal impact of defense and indemnity costs in two tribunals — workers' compensation and federal court — upon already under-funded public entities is immeasurable. The Ninth Circuit has launched the Fourth Amendment onto a new ocean of limitless liability, and petitioners respectfully request this Court to right the ship.

Accordingly, petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 28, 1998

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JENNIFER JENSEN, individually and as Administrator of the Estate of JAMES REX JENSEN, JR., deceased and LINDSEY ELIZABETH JENSEN and KATELYN MELISA JENSEN, minors by and through JENNIFER JENSEN, guardian ad Litem,

Plaintiff-Appellee,

v.

CITY OF OXNARD; CHIEF HAROLD HURTT, individually and as Chief of Police; STAN MEYERS, individually and as Assistant Chief of Police; TOM CADY, individually and as Assistant Chief of Police; JOHN CROMBACH, individually and as Commander; BILL LEWIS, individually and as Sergeant; DANIEL CHRISTIAN, individually and as Sergeant; and DOES 1 through 100, inclusive,

Defendants-Appellants.

No. 97-55936

D.C. No. CV-97-01096-SVW

OPINION

Appeal from the United States District Court for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted
February 5, 1998—Pasadena, California

Filed May 28, 1998

Before: J. Clifford Wallace, Stephen S. Trott and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins; Concurrence by Judge Wallace

SUMMARY

Individual Rights/Civil Rights

The court of appeals affirmed an order of the district court. The court held that in a civil rights action under 42 U.S.C. § 1983, a police officer is not per se entitled to qualified immunity for the accidental shooting of a fellow officer during law-enforcement activity.

A "SWAT" team of appellant City of Oxnard Police Department stormed an unoccupied residence to serve a search warrant. Officer James Jensen threw a smoke-producing grenade onto a second-floor landing and went upstairs with appellant Sergeant Daniel Christian and other officers. Christian mistook Officer Jensen for an armed suspect and shot him dead.

Officer Jensen's wife, appellee Jennifer Jensen, sued the City, police officials, and others under 42 U.S.C. § 1983. The complaint alleged that Oxnard violated Officer Jensen's Fourth and Fourteenth Amendment rights because Christian used excessive and unreasonable deadly force; the City and various officials acted with deliberate indifference to the maintaining, training, and control of its SWAT team; and the indifference was a proximate cause in Christian's violation of Officer Jensen's constitutional rights.

Oxnard moved to dismiss on the grounds that Jensen failed to allege a violation of a specific and well-founded constitutional right, and the individual defendants were entitled to

qualified immunity. The district court denied Oxnard's motion. The defendants took an interlocutory appeal.

[1] To sustain an action under § 1983, a plaintiff must show that the conduct complained of was committed by a person acting under color of state law, and that the conduct deprived the plaintiff of a federal constitutional or statutory right. [2] Moreover, in seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights, one must demonstrate that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences.

[3] The complaint adequately stated a cause of action. Jensen alleged that Christian was highly likely to inflict the particular injury suffered by Officer Jensen as a result of Oxnard's deliberate indifference toward the staffing and training of its SWAT teams. [4] The allegation that by intentionally shooting at a figure he mistook for an armed criminal, Christian engaged in a Fourth Amendment seizure, was supported in the law. [5] The allegations, that through its training and control of its SWAT team, Oxnard was the moving force behind Christian's actions, were sufficient to state a plausible link between the policymaker's inadequate decision and the particular injury alleged.

[6] The Constitution does not guarantee a right to a safe workplace. [7] Although this case was similar to safe workplace cases in that they concerned individuals who voluntarily accepted an offer of employment, this case was different in one significant way—the nature of the injury alleged.

[8] The cases cited by Oxnard involved workplace injuries, including attacks by third parties against public employees, government failure to protect its employees, and attacks by prisoners on guards. [9] However, none of those cases involved the use of excessive force by a government agent against a government agent. The difference was quite signifi-

cant. While the safe workplace cases concerned the failure of the state adequately to train, prepare, or protect government employees from non-state actors, this case involved alleged intentional or reckless acts of a government employee directed against another government employee.

[10] Officer Jensen did not forfeit all constitutional rights when he became a member of the police force. Like all individual officers, Officer Jensen maintained some constitutional rights, which if violated by a state actor, can result in liability under § 1983. In particular, he retained the Fourth Amendment right to be free from unreasonable seizure by fellow officers while performing police work.

[11] Government officials are given qualified immunity from civil liability under § 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In analyzing a qualified immunity defense, courts must determine: (1) what right has been violated; (2) whether the right was so clearly established at the time of the incident that a reasonable officer would have been aware of its constitutionality; and (3) whether a reasonable public officer could have believed that the alleged conduct was lawful.

[12] The complaint alleged the violation of a specific right: the Fourth Amendment right to be free from an unreasonable seizure. Thus, it had to be decided whether that right was clearly established when Christian killed Officer Jensen. [13] A right is clearly established if its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right. Jensen had to establish only that Oxnard's unlawfulness was apparent in light of preexisting law.

[14] Officer Jensen had a clearly established right to be free from unreasonable seizure at the time he was killed. If the

allegations with respect to Christian's conduct were true, his unlawfulness was "apparent" in light of preexisting law.

[15] It was well established that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. [16] Moreover, it was long since established that police officers retain their Fourth Amendment rights. [17] Finally, it was clearly established that a police officer may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons. In addition, a police officer must, if practicable, issue a warning before using deadly force.

[18] The question was whether, in light of the clearly established principles governing Christian's conduct, each of the defendants could reasonably have believed that the conduct was lawful. Based on the facts alleged, Christian did not act reasonably when he shot Officer Jensen to death.

[19] The reasonableness of an individual's use of force is reviewed from the perspective of a reasonable officer on the scene. Reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation. The question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

[20] It was clear that some factual issues had to be resolved to determine the reasonableness of the City's actions. If Christian shot Officer Jensen three times in the back from a distance of three feet in conditions in which he should have been able to recognize that the figure he was shooting at was a fellow officer, such a use of force would have been unreasonable. If police officials knew that Christian was likely to inflict a constitutional injury, or if their practices and policies

showed a deliberate indifference to the danger such an individual posed, they should be liable under § 1983. Because under Jensen's version of the shooting Christian could not have reasonably believed that the use of deadly force was lawful, none of the individual defendants were entitled to qualified immunity.

Judge Wallace concurred separately, writing that the only inquiry on appeal was whether there was qualified immunity, and that the court should not have reached the issue of whether the complaint stated a claim.

COUNSEL

Jeffrey Held and Alan E. Wisotsky, Law Offices of Alan E. Wisotsky, Oxnard, California, for the defendants-appellants.

Edward Steinbrecher, Steinbrecher and Associates, Encino, California, for the plaintiff-appellee.

OPINION

HAWKINS, Circuit Judge:

Officer James Jensen was shot and killed by a fellow officer during a SWAT Unit raid to serve a search warrant on an unoccupied residence. His widow, Jennifer Jensen, brought a 42 U.S.C. § 1983 action against the City of Oxnard, its police chief and several individual officers. The defendants moved to dismiss for failure to state a claim under Rule 12(b)(6). The district court denied this motion. We affirm.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of March 13, 1996, the Special Weapons and Tactics ("SWAT") team of the Oxnard Police

Department stormed a two-story townhouse to serve a search warrant on what turned out to be an unoccupied residence. As part of the operation, Officer James Jensen ("Officer Jensen") threw a "flash-bang" grenade from a staircase onto a second floor landing. The grenade exploded with a blast of light, emitting smoke into the surrounding rooms. Officer Jensen and several other SWAT team members, including Sergeant Daniel Christian ("Sergeant Christian"), went up the staircase to the second floor. Shortly thereafter, Sergeant Christian fired three rounds from his 12-gauge shotgun, killing Officer Jensen.

Although the parties dispute the facts as to exactly how Officer Jensen was killed (e.g., whether he was shot in the back; whether he was entering the room directly in front of Sergeant Christian; the degree to which vision was obscured by the grenade smoke), the parties agree that, "[i]n the turmoil of events, [Sergeant] Christian mistook [Officer Jensen] for a gun-wielding occupant of the premises and shot him to death."

Jennifer Jensen ("Jensen"), widow of Officer Jensen, filed a complaint against the City of Oxnard, the Chief of Police, and various individual officers, including Sergeant Christian (collectively "Oxnard" or the "City"). In the complaint, Jensen alleges the intentional and reckless acts of Sergeant Christian, which were a result of Oxnard's "deliberate indifference" regarding the training and control of those officers who conducted the March 13 raid, resulted in a violation of her husband's civil rights under 42 U.S.C. § 1983.

Oxnard moved to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that Jensen failed to state a cause of action upon which relief could be granted. Oxnard argued, as it does in this appeal, that this action should be dismissed because: (1) Jensen cannot sustain a § 1983 claim without alleging that specific and well-founded constitutional rights have been vio-

lated; and (2) the individual defendants are entitled to qualified immunity. The district court denied Oxnard's motion.

JURISDICTION

We have interlocutory appellate jurisdiction to review the denial of a 12(b)(6) motion to dismiss as long as that review does not require the resolution of any controlling facts. *See Behrens v. Pelletier*, 516 U.S. 299, 305-07, 116 S. Ct. 834, 838-39 (1996). We can resolve this case simply by answering questions of law.

STANDARD OF REVIEW

A district court's decision of qualified immunity in a 42 U.S.C. § 1983 action is reviewed de novo. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994).

While a district court's denial of a 12(b)(6) motion generally is not a reviewable final order, when the question of immunity is raised "we use the collateral order doctrine to exercise jurisdiction" and our review of the district court's denial is de novo. *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir. 1993). We must assume the truth of all material allegations in the complaint and construe them in the light most favorable to Jensen. *See NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). A dismissal is warranted if it appears beyond doubt that Jensen can prove no set of facts in support of her claims that would entitle her relief. *See Figueroa*, 7 F.3d at 1409.

ANALYSIS

I. Friendly Fire Seizure

A. *Violation of a Constitutional Right*

[1] "To sustain an action under section 1983, a plaintiff must show (1) that the conduct complained of was committed

by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right." *Wood v. Ostrander,* 879 F.2d 583, 587 (9th Cir. 1989).

[2] Moreover, in "seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights [one] must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences." *Board of the County Comm'rs v. Brown,* ___ U.S. ___, ___, 117 S. Ct. 1382, 1390 (1997).

[3] This complaint adequately states a cause of action. Specifically, it alleges that Oxnard violated Officer Jensen's Fourth and Fourteenth Amendment rights in two respects: (1) Sergeant Christian used excessive and unreasonable deadly force; and (2) the City of Oxnard and various officials in the Oxnard Police Department acted with deliberate indifference to the maintenance, training, and control of its SWAT teams, and that indifference was a proximate cause in Sergeant Christian's violation of Officer Jensen's constitutional rights. In other words, Jensen alleges that Sergeant Christian was "highly likely to inflict the particular injury suffered by" Officer Jensen as a result of Oxnard's deliberate indifference towards the staffing and training of its SWAT teams. *Brown,* 117 S. Ct. at 1392.

[4] The allegation that Sergeant Christian, by intentionally shooting at a figure he mistook to be an armed criminal, engaged in a Fourth Amendment seizure is supported in the law. *See Brower v. County of Inyo,* 489 U.S. 593, 596-97 (1989) (a seizure is a "governmental termination of freedom of movement through means intentionally applied" and a "seizure occurs even when an unintended person or thing is the object of the detention or taking"); *Tennessee v. Garner,* 471 U.S. 1, 7 (1985) ("[T]here can be no question that appre-

hension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.").

[5] Somewhat less clearly, the complaint alleges that Oxnard, through its training and control of its SWAT unit, was the "moving force" behind Sergeant Christian's actions. According to the complaint, the City of Oxnard: (1) failed adequately to train or equip the members of the SWAT team; (2) failed to control those members of the SWAT team who have a known propensity for violence; and (3) failed to investigate SWAT team members for potential substance abuse and/or mental problems. Moreover, the complaint specifically alleges that the police chief, assistant police chief, and police commander assigned Sergeant Christian to the SWAT team "knowing that he was using mind-altering drugs, including phenobarbetol and other substances." These allegations are sufficient to allege a plausible "link between the policymaker's inadequate decision and the particular injury alleged." *Brown*, 117 S. Ct. at 1391.

B. *Right to a Safe Workplace*

Oxnard contends that these allegations do not suffice to state a potential constitutional violation. Without denying that Sergeant Christian's shooting of Officer Jensen constitutes a seizure under the Fourth Amendment, Oxnard attempts to portray this case as a "safe workplace" case. Oxnard cites a line of cases, discussed below, in which the Supreme Court and other lower courts have held that there is no constitutional right to a safe working environment. Essentially, public employees cannot bring § 1983 claims against their employers for injuries suffered on the job on the theory that the government "violated a federal constitutional obligation to provide its employees with certain minimal levels of safety and security." *Collins v. City of Harker Heights*, 503 U.S. 115, 127 (1992).

[6] We recognize that the Constitution does not guarantee a right to a safe workplace. *See id.* at 126-28. In *Collins*, a city

sanitation department worker died while trying to clear a sewer line. His widow brought a § 1983 action against the city on the theory that her husband "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and had a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees." *Id.* at 117. She alleged that the city violated that right by following a custom and policy of inadequate training. Affirming the dismissal of this action, the Supreme Court held that the Constitution contains no right to a safe working environment. *See id.* at 126. Accordingly, the city's alleged failure to train could not amount to a constitutional violation.

[7] Employing *Collins,* Oxnard argues that Officer Jensen could not have had any of his rights violated because he was injured while performing his duties as a police officer. We reject this argument and Oxnard's attempt to turn this into a safe workplace case. Although this case is similar to the safe workplace cases in that they both concern individuals who "voluntarily accepted . . . an offer of employment," *id.* at 128, this case is different in one significant way — the nature of the injury alleged.

[8] The other cases cited by Oxnard involve a variety of workplace injuries, including attacks by third parties against public employees, *see Rutherford v. City of Newport News,* 919 F. Supp. 885 (E.D. Va. 1996), *aff'd,* 107 F.3d 867 (4th Cir. 1997); *Hartman v. Bachert,* 880 F. Supp. 342 (E.D. Pa. 1995), an alleged government failure to protect its employee, *see Skinner v. City of Miami,* 62 F.3d 344 (11th Cir. 1995), and attacks by prisoners on guards. *See Walker v. Rowe,* 791 F.2d 507 (7th Cir. 1986).

[9] None of these cases, however, involve the use of excessive force by a government agent against a government agent. Oxnard argues that this is a "distinction without a difference." We conclude that the difference is quite significant. While the

safe workplace cases concern the failure of the state adequately to train, prepare, or protect government employees from non-state actors, this case involves the allegedly intentional or reckless acts of a government employee directed against another government employee.[1]

Oxnard suggests that this case is distinguishable from a case in which an innocent civilian or even a criminal suspect is caught in the line of fire. In either of those situations, Oxnard concedes, the injured party would be able to allege a § 1983 action. The only difference here is the decedent was a police officer injured in the line of duty. Officer Jensen volunteered for the dangerous police work associated with SWAT teams. Thus, we agree with Oxnard, Jensen cannot argue that her husband is like those individuals to whom the State owes a duty to care because they have been deprived of their liberty. *See, e.g., Youngberg v. Romeo,* 457 U.S. 307, 315-16 (1982) (persons in mental institutions); *Turner v. Safley,* 482 U.S. 78, 94-99 (1987) (convicted felons); *City of Revere v. Massachusetts Gen. Hosp.,* 463 U.S. 239, 244-45 (1983) (persons under arrest).

[10] Nonetheless, Officer Jensen did not forfeit all constitutional rights when he became a member of the police force.[2] *See Jackson v. Gates,* 975 F.2d 648 (9th Cir. 1992) (drug test-

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[1]Although *Skinner,* 62 F.3d at 344, involved employee-on-employee conduct, Skinner did not argue that his Fourth Amendment rights were violated. Rather, he alleged that the city has a constitutional duty to protect employees from one another. Because there is no constitutional right to a safe workplace, the Eleventh Circuit found, this claim must fail. Jensen, on the other hand, alleges a particular constitutional violation — Fourth Amendment seizure — which exists independent of the workplace.

[2]Oxnard argues for precisely this outcome when it suggests that:

> [t]he voluntary acceptance of an offer of public employment precludes the existence of a constitutional right for tragic physical injury sustained by that employee in the very course of operations involved, no matter exactly how the injury may occur, whether at the hands of a criminal or another officer.

ing of police officers subject to reasonableness test of the Fourth Amendment); *Graham v. Davis,* 880 F.2d 1414, 1418-19 (D.C. Cir. 1989) (allowing officer to bring excessive force § 1983 action against other officers based on altercation with those officers in the process of an arrest). Rather, like all individual police officers, Officer Jensen maintained some constitutional rights (including Fourth Amendment rights) which, if violated by a state actor, can result in liability under § 1983. In particular, he retained the right at issue here — the Fourth Amendment right to be free from unreasonable seizure by fellow officers while performing police work.

Accordingly, we hold that Jensen has properly stated a claim upon which relief can be granted.[3]

II. Qualified Immunity

[11] All of the individual defendants claim that they are

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[3]We also reject Oxnard's contention that traditional state workers' compensation law precludes Jensen's § 1983 claim. The cases cited by Oxnard are inapplicable to this case as none of those cases involved a deprivation of constitutional rights. *See Washington v. District of Columbia,* 802 F.2d 1478, 1481 (D.C. Cir. 1986) (prison guard who was attacked by prisoner failed to state constitutional injury); *McClary v. O'Hare,* 786 F.2d 83, 87 (2d Cir. 1986) (no recovery against state because deprivation of right "did not occur as a result of some state procedure"); *Hayes v. Vessey,* 777 F.2d 1149 (6th Cir. 1986) (prison teacher injured by "a third party not a state employee or official").

Moreover, to the extent workers' compensation precludes recovery for other causes of action, it does not preclude recovery for claims involving "substantive rather than procedural constitutional rights." *Smith v. Fontana,* 818 F.2d 1411, 1419-20 (9th Cir. 1987); *see also Daniels v. Williams,* 474 U.S. 327 106 at 678 (1986) (separate opinion of Stevens, J.) ("If the claim [concerns a] . . . violation of one of the specific constitutional guarantees of the Bill of Rights[ ], a plaintiff may invoke § 1983 regardless of the availability of state remedy."). Indeed, we have previously recognized that personal injury claims that implicate constitutional rights are not preempted by state workers' compensation acts. *See Maynard v. City of San Jose,* 37 F.3d 1396, 1405 (9th Cir. 1994).

entitled to qualified immunity. Government officials are given qualified immunity from civil liability under § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). In analyzing a qualified immunity defense, we must determine: (1) what right has been violated; (2) whether that right was so "clearly established" at the time of the incident that a reasonable officer would have been aware of its constitutionality; and (3) whether a reasonable public officer could have believed that the alleged conduct was lawful. *See Gabbert v. Conn,* 131 F.3d 793, 799 (9th Cir. 1997); *Newell v. Sauser,* 79 F.3d 115, 117 (9th Cir. 1996).

[12] As stated above, the complaint alleges the violation of a specific right: the Fourth Amendment right to be free from an unreasonable seizure. Thus, we must decide whether that right was clearly established when Sergeant Christian killed Officer Jensen.

[13] A particular right is "clearly established" if "the contours of [that] right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). To show that the right in question here was clearly established, Jensen need not establish that Oxnard's "behavior had been previously declared unconstitutional, only that the unlawfulness was apparent in light of preexisting law." *Blueford v. Prunty,* 108 F.3d 251, 254 (9th Cir. 1997). Indeed, "precedent directly on point is not necessary to demonstrate a clearly established right." *Id.* at 255. Rather, "[i]f the only reasonable conclusion from binding authority were that the disputed right existed, even if no case had specifically declared, [police] would be on notice of the right and officials would not be qualifiedly immune if they acted to offend it." *Id.*

[14] We conclude that Officer Jensen had a clearly established right to be free from unreasonable seizure at the time

he was killed. Although we have been unable to find a case in which a court has found the exact right at issue here, we conclude that if the allegations with respect to Sergeant Christian's conduct are true, then his unlawfulness was "apparent" in "light of preexisting law." *Anderson,* 483 U.S. at 640.

[15] In *Graham v. Connor,* 490 U.S. 386, 395 (1989), the Supreme Court held that "*all* claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest . . . or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ." Similarly, it was well established at the time of this incident that "[t]here is no question that the apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Cunrow v. Ridgecrest Police,* 952 F.2d 321, 324 (9th Cir. 1991).

[16] Moreover, it has long since been established that police officers "are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967). Regarding the rights at issue here, it was clearly established that police officers retain their Fourth Amendment rights. *See, e.g., Jackson,* 975 F.2d at 652-53 (drug testing of police officers subject to reasonableness requirements of the Fourth Amendment); *Graham,* 880 F.2d at 1418-19 (allowing officer to bring excessive force § 1983 action against other officers based on altercation with those officers in the process of an arrest); *Los Angeles Police Protective League v. Gates,* 907 F.2d 879 (9th Cir. 1990) (officer's Fourth Amendment rights violated by administrative search of his garage); *Kirkpatrick v. City of Los Angeles,* 803 F.2d 485 (9th Cir. 1986) (strip searches of police officers conducted at police station violated officers' Fourth Amendment rights).[4]

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[4]Although most of these cases only discuss the police officers' Fourth Amendment right to be free from unreasonable searches, the Fourth Amendment clearly covers unreasonable seizures as well.

[17] Finally, concerning the use of deadly force, it was clearly established at the time of this incident that a police officer "may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons." *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997), *cert. denied sub nom. Smith v. Harris*, 118 S. Ct. 1051 (1998). In addition, if practicable, a police officer must issue a warning before using deadly force. *See Garner*, 471 U.S. at 11-12.

"It is clearly established, both by common sense and by precedent," that, on the day he was killed, Officer Jensen had a right to be free from unreasonable seizure in violation of his Fourth Amendment rights. *Newell*, 79 F.3d at 117. Precedent informs us that: (1) excessive force claims are to be analyzed under Fourth Amendment standards; (2) police officers retain their Fourth Amendment rights; and (3) it is a violation of the Fourth Amendment for law enforcement personnel to use deadly force unless the individual at whom that force is directed presents an immediate or serious threat of danger. Common sense tells us that, if these clearly established precedents are to mean anything, Officer Jensen had the right to be free from an unreasonable seizure even from a fellow officer in the course of police work.

[18] Thus, the question we must answer is whether, in light of the clearly established principles governing Sergeant Christian's conduct at the time of the incident, each of the defendants "could reasonably have believed that the conduct was lawful." *Harris*, 126 F.3d at 1201. Examining the law concerning the use of deadly force, we hold that, based on the facts alleged in the complaint, Sergeant Christian did not act reasonably when he shot Officer Jensen to death.[5]

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[5]Oxnard argues that this case does not fit within the "deadly force" line of cases because those cases all concerned the rights of criminal defendants or free citizens. We disagree. The only difference between those cases and this case is that the injured person happened to be a police officer. This factor affects neither the rights at stake nor the test we apply in reviewing Sergeant Christian's conduct.

[19] The reasonableness of an individual's use of force is reviewed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor,* 490 U.S. at 396. Moreover, the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation." *Id.* at 396-97. Nonetheless, this test is "an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

[20] Considering this case, it is clear that some factual issues need to be resolved in order to determine the reasonableness of the City's actions. If, as is alleged in the complaint, Sergeant Christian shot Officer Jensen three times in the back from a distance of three feet in conditions in which he should have been able to recognize that the figure he was shooting was a fellow officer, such a use of force would be unreasonable. Similarly, if police officials knew Sergeant Christian was likely to inflict a constitutional injury or if their practices and policies showed a "deliberate indifference" to the danger such an individual posed, they should be liable under § 1983. Because, under Jensen's version of the shooting, Sergeant Christian "could not have reasonably believed the use of deadly force was lawful," none of the individual defendants are entitled to qualified immunity at this stage of the action. *Cunrow,* 952 F.2d at 325 (police not entitled to qualified immunity where, under plaintiff's version of the facts, decedent did not point gun at officers nor was he facing them when they initially shot at him).

Clearly, material and important issues of fact remain to be determined. Those facts might very well show that neither Sergeant Christian nor any of the other defendants acted unreasonably here. As a matter of law, however, they are not

entitled to immunity simply because the injured party is a police officer.

CONCLUSION

The complaint adequately states a claim upon which relief can be granted. It asserts that Officer Jensen's Fourth Amendment right to be free from unreasonable seizure was violated when he was shot by another officer. Although individuals assume a certain level of risk by accepting employment as police officers, they do not forfeit their constitutional rights by doing so.

Moreover, while a fully developed set of facts might show that the individual defendants acted reasonably here, they are not entitled to qualified immunity as a matter of law and the district court acted properly when it denied Oxnard's motion to dismiss.

AFFIRMED.

WALLACE, Circuit Judge, concurring:

For the reasons stated in part II, I concur in the affirmance of the holding of the district court that the appellants are not entitled to qualified immunity as a matter of law, and, therefore, the district court properly denied the motion to dismiss the action. I would not get to the merits of the action under part I.

The Supreme Court has limited what we may decide on appeal to the question of immunity separate from the merits of the underlying action. *Mitchell v. Forsyth*, 472 U.S. 511, 529 (1985). "An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine

whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions . . . ." *Id.* at 528. "[T]he legal determination that a given proposition of law was not clearly established at the time the defendant committed the alleged acts does not entail a determination of the 'merits' of the plaintiff's claim that the defendant's actions were in fact unlawful." *Id.* at 529 n.10. We have also recognized that the proper inquiry in an appeal similar to this is only whether there is qualified immunity, not whether the complaint states a claim. *Figueroa v. United States,* 7 F.3d 1405, 1409 (9th Cir. 1993).

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING THE PETITION FOR REHEARING FILED JULY 20, 1998

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JENNIFER JENSEN, individually and as Administrator of the Estate of JAMES REX JENSEN, JR., deceased; LINDSEY ELIZABETH JENSEN and KATELYN MELISA JENSEN, minors, by and through JENNIFER JENSEN as Guardian ad Litem,	Case No. 97-55936
Plaintiff — Appellee,	D.C. No. CV-97-01096-SVW (Central Dist. Calif.)
v.	ORDER
CITY OF OXNARD; CHIEF HAROLD HURTT, individually and as Chief of Police; STAN MEYERS, individually and as Assistant Chief of Police; TOM CADY, individually and as Assistant Chief of Police; JOHN CROMBACH, individually and as Commander; BILL LEWIS, individually and as Sergeant; DANIEL CHRISTIAN,	

individually and as Sergeant; and)
DOES 1 through 100, inclusive,)
)
Defendants — Appellants.)
)

Before: WALLACE, TROTT and HAWKINS, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has called for a vote to rehear this matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DENYING MOTION TO DISMISS FILED JUNE 26, 1997

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JENNIFER JENSEN, individually and as Administrator of the Estate of JAMES REX JENSEN, JR., deceased; LINDSEY ELIZABETH JENSEN and KATELYN MELISA JENSEN, minors, by and through JENNIFER JENSEN as Guardian ad Litem, Plaintiffs, v.	No. 97-1096 SVW (AJWx) **ORDER DENYING DEFENDANTS' MOTION TO DISMISS** **[PROPOSED] [BY PLAINTIFFS]**

CITY OF OXNARD; CHIEF HAROLD HURTT, individually and as Chief of Police; STAN MEYERS, individually and as Assistant Chief of Police; TOM CADY, individually and as Assistant Chief of Police; JOHN CROMBACH, individually and as Commander; BILL LEWIS, individually and as Sergeant; DANIEL CHRISTIAN, individually and as Sergeant; and DOES 1 through 100, inclusive,

Defendants.

The Honorable Stephen V. Wilson, United States district judge, orders as follows in reference to defendants' motion to dismiss:

On May 19, 1997, at 1:30 p.m. in Courtroom 6, the Court heard extensive oral presentation concerning defendants' motion to dismiss based upon Federal Rule of Civil Procedure 12(b)(6). Having read and considered the moving, opposing, and reply papers, the Court hereby orders that the defendants' motion to dismiss is denied.

IT IS SO ORDERED.

Dated: 6/26/97

/s/ Stephen V. Wilson
STEPHEN V. WILSON
United States District Judge

(2)

FILED
OCT 27 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-426

In The

Supreme Court of the United States

October Term, 1998

CITY OF OXNARD, *et al.*,

Petitioners,

vs.

JENNIFER JENSEN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Supreme Court Rule 10 1

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit Court of Appeals decision in this case because there are no special or important reasons for granting certiorari according to the considerations governing review on certiorari as set forth in Rule 10 of the rules of this Court.

STATEMENT OF JURISDICTION

Respondents concur that jurisdiction of this Court is asserted under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

This case involves the intentional and reckless use of deadly force by one police officer against another police officer who was mistakenly identified as a suspect during a "shoot to kill" SWAT raid. According to the complaint, the City of Oxnard staged a reckless SWAT unit raid to serve a search warrant on an unoccupied residence. Officer Jensen led the raid and was required to detonate a "flash-bang" grenade. The grenade obscured visibility in the room. " '[i]n the turmoil of events, [Sergeant] Christian mistook [Officer Jensen] for a gun-wielding occupant of the premises and shot him to death.' " [Slip Opn., App. A to Pet. p. 7a].

Officer Jensen's wife and children brought suit in federal district court against petitioners the City of Oxnard and individual defendants including Sergeant Christian, alleging a violation of Officer Jensen's rights under the Fourth Amendment to be free from unreasonable seizure. The premise of the complaint is that Sergeant Christian's use of deadly force was excessive and unreasonable under the circumstances. Petitioners moved to dismiss the complaint on the grounds that they are all entitled to qualified immunity and that the complaint

failed to state a claim under Fed. R. Civ. P. 12(b)(6). On interlocutory appeal, the court of appeals affirmed the district court's decision that the complaint stated a valid legal claim under the Fourth Amendment and that Officer Jensen's status as a police officer did not deprive him of his rights under the Fourth Amendment. The court of appeals further ruled that neither the individual defendants nor the City are entitled to qualified immunity because Officer Jensen's Fourth Amendment right to be free from unreasonable seizure was well-established at the time of the shooting. The case was remanded for discovery and further pre-trial proceedings.

REASONS FOR DENYING THE WRIT

In essence, the City of Oxnard[1] seeks review claiming that a police officer is not a "free citizen," has no Fourth Amendment rights, and is restricted to worker's compensation benefits even when illegally seized and killed as a suspect.

The City's arguments are inapposite and do not justify granting certiorari in this case.

Officer Jensen was not shot in the back three times because he was a police officer; **he was shot because Sergeant Christian considered Jensen the suspect**.

Review is unwarranted for two reasons.

First, there is no conflict among the federal circuit courts or state courts of last resort regarding the questions presented here. Second, the court of appeals' conclusion that defendants are not entitled to qualified immunity from plaintiffs' claim of unreasonable seizure under the Fourth Amendment is well

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1. Petitioners will be collectively referred to as "the City."

established in the case law including the precedents of this Court.

The City's effort to mischaracterize this as a "safe workplace" case simply ignores the plain facts which show an unlawful seizure of Officer Jensen. "A seizure occurs even when an unintended person or thing is the object of the detention or taking." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

Contrary to the City's petition, police officers do not forfeit their Fourth Amendment rights by joining the police force. *Jackson v. Gates*, 975 F.2d 648 (9th Cir. 1992); *Graham v. Davis*, 880 F.2d 1414, 1418-1419 (D.C. Cir. 1989).

The Ninth Circuit did not ignore the proper role of state government in a federal system. Workers' compensation laws do not necessarily preempt remedies for civil rights violations. *Maynard v. City of San Jose*, 37 F.3d 1396 (9th Cir. 1994).

This is not an "abnormally dangerous employment" case. Nothing in *Collins v. Harker Heights*, 503 U.S. 115 (1992) suggests that an illegally shot suspect who happens to be a police officer does not have constitutional remedies. As the Ninth Circuit recognized in this case,

> While the safe workplace cases concern the failure of the state to adequately train, prepare, or protect government employees from non-state actors, this case involves the allegedly intentional or reckless acts of a government employee directed against another government employee.

[Slip Opn., App. A to Pet. pp. 11a-12a].

The Ninth Circuit Opinion does not convert federal courts into workers' compensation appeals boards. Indeed, the City exaggerates the potential costs to public entities. And, of course, the cost argument is simply inapposite to the necessary redress of civil rights violations.

The Ninth Circuit opinion has not constitutionalized the common law of torts but merely applies existing precedent to the facts of this case. *See, i.e., Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985).

The City's petition does not raise issues of importance except to the litigants in this case. As Chief Justice Taft observed,

> . . . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

There are no such reasons for granting certiorari in this case.

I.

THERE IS NO CONFLICT IN THE FEDERAL CIRCUIT COURTS OR STATE HIGH COURTS.

There is no split in authority over the court of appeals' determination that the complaint states a valid legal claim and

that petitioners are not entitled to qualified immunity for the allegation in the complaint of an intentional and reckless violation of decedent's Fourth Amendment right to be free from unreasonable seizure. Petitioners have identified no such split in authority. The only other court of appeals decisions discovered by either party are consistent with the Ninth Circuit's holdings in this and prior cases. Thus, the D.C. Circuit has permitted a claim against city officials arising under the Fourth Amendment for an unreasonable seizure arising out of an altercation and shooting between two police officers at the scene of a crime. *See Graham v. Davis*, 880 F.2d 1414, 1417 (D.C. Cir. 1989). The Ninth Circuit has previously held that police officers may recover under section 1983 for unreasonable searches. *See Jackson v. Gates*, 975 F.2d 648, 652 (9th Cir. 1992). Neither party has identified any decisions of a state high court to the contrary of the court of appeals' holding here. Accordingly, there is no conflict warranting this Court's review.

II.

THE COURT OF APPEALS' CONCLUSION THAT THE COMPLAINT STATES A VALID CLAIM AND THAT PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY IS WELL-ESTABLISHED IN THE CASE LAW.

A. Police Officers Have Rights Not To Be Shot in the Back Under the Fourth Amendment's Prohibition Against Unreasonable Seizure.

The court of appeals followed well established case law by analyzing Officer Jensen's claim as an unreasonable seizure under the Fourth Amendment. Here, the complaint alleges that Sergeant Christian intentionally applied excessive deadly force to seize or stop Officer Jensen. A Fourth Amendment seizure

occurs whenever government actors have "in some way restrained the liberty of a citizen." *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989). "A seizure occurs even when an unintended person is the object of the detention or the taking." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

Petitioners admit that Sergeant Christian intended to gain control over Officer Jensen because he thought Jensen was the suspect. Any "mistake" as to Jensen's identity does not vitiate Jensen's Fourth Amendment rights. *See Hill v. California*, 401 U.S. 797, 802-05 (1971) (seizure occurs in case of mistaken identity because detention was intended even though the specific subject was not the intended object); *see also Grandstaff v. City of Borger*, 767 F.2d 161, 165-68 (5th Cir. 1985) (shooting of an innocent victim on the mistaken belief that victim was a fleeing suspect gives rise to liability because seizure intended even though target was not). Sergeant Christian intentionally terminated Officer Jensen's freedom of movement by shooting him. Because "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment," the complaint alleges a violation of section 1983. *See Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

Moreover, it is well established that a citizen does not forfeit his constitutional rights when he becomes a member of the police force. *See Jackson v. Gates*, 975 F.2d at 653 (drug testing of police officers subject to reasonableness test for seizure under the Fourth Amendment); *Graham v. Davis*, 880 F.2d at 1417 (permitting claim by police officer for unreasonable seizure under the Fourth Amendment as a result of altercation with another officer at crime scene); *see also Meyer v. Robinson*, 992 F.2d 734 (9th Cir. 1993); *Rutherford v. City of Newport News*, 919 F. Supp. 885, 896 (E.D. Va. 1996) ("Of course, government employees do not lose their

constitutional rights once they agree to work for the state.") Public employees retain their rights under the Fourth Amendment to be free from unreasonable searches and seizures. *See National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). Thus, petitioners' arguments that police officers are equivalent to school children and that their status deprives them of the full protection of the Fourth Amendment is simply wrong. [*See* Pet. pp. 6-7].

Since respondent's claim arises under the Fourth Amendment, petitioners' argument that this case must be analyzed under the Due Process Clause of the Fourteenth Amendment is misplaced, as the very cases on which they rely establish.

> Where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing those claims.

County of Sacramento v. Lewis, 118 S. Ct. 1708, 1714 (1998) (citing *Graham v. Connor*, 490 U.S. at 394); *see also Tennessee v. Garner*, 473 U.S. at 7-22.

Respondent need not demonstrate that she can satisfy the standards for recovery under the Fourteenth Amendment because the claim arises properly under the Fourth Amendment. Compare *County of Sacramento v. Lewis*, 118 S. Ct. at 1712 (decedent did not allege violation of Fourth Amendment but only substantive due process from high speed car chase); *Collins v. Harker Heights*, 503 U.S. 115, 127 (1992) (decedent alleged only violation of substantive due process by failing to provide a safe workplace).

Similarly, the allegations of this complaint are not analogous to those of the pretrial detainees in *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) (en banc), who, by reason of their status as pretrial detainees may not rely on the Eighth Amendment but are limited to claims under the Due Process Clause of the Fourteenth Amendment. *Id.* at 1166.[2]

Because this case falls well within established Fourth Amendment doctrine, there is no need for respondent to rely on another theory of recovery. Thus, even if respondent could not satisfy the Fourteenth Amendment standards, that does not preclude her Fourth Amendment claim. *See Graham v. Connor*, 490 U.S. at 395.

Petitioners also claim that police officers are not entitled to the protections of the Fourth Amendment, but are limited to workers' compensation benefits even when illegally seized and killed by an officer as a suspect. This claim is misplaced because Officer Jensen was not killed by gas fumes or other work related factors: **he was seized and killed because he was a suspect**.

As the court of appeals recognized in distinguishing *Collins* from this case,

> while the safe workplace cases concern the failure of the state to adequately train, prepare, or protect government employees from non-state actors, this case involves the allegedly intentional or reckless

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2. In *Riley*, the Fourth Circuit rejected pretrial detainees claim that they were entitled to assert violations under the Fourth Amendment where allegations concerned use of excessive force beyond the time of arrest. 115 F.3d at 1161-64; *see also Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979) (Due Process Clause protects pretrial detainees from use of excessive force that amounts to punishment).

> acts of a government employee directed against another government employee.

[Slip Opn., App. A to Pet. pp. 11a-12a]. For the same reasons, the other cases cited by petitioners involving workplace injuries are readily distinguishable because they did not "involve the use of excessive force by a government agent against a government agent." *Id.* (citing cases).[3]

The court of appeals was also correct in affirming the district court's denial of qualified immunity. It was well established at the time of Officer Jensen's death that an officer may not shoot to kill a suspect unless certain circumstances are present, such as the officer was threatened or the officer could reasonably anticipate that the suspect would cause harm to others. *See Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997) (citing cases).

Moreover, the court of appeals was also correct in concluding that police officers are required to give a warning if possible before shooting to kill. *Tennessee v. Garner*, 471 U.S. at 11-12. Thus, Sergeant Christian could have no reasonable belief that he had a license to shoot and kill innocent persons if they were mistaken for suspects. *Cf. id.* at 11. He could have no reasonable belief that shooting blindly into a

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3. None of the remaining safe workplace cases cited by petitioners, all of which predate *Collins*, involved a deliberate deprivation of constitutional rights by unreasonable use of excessive force alleged here or even alleged injury by a state actor. *See Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) (prison guard attacked by prisoner failed to state constitutional injury); *McClary v. O'Hare*, 786 F.2d 83, 87 (2d Cir. 1986) (wrongful death of county highway department employee from fatal accident); *Hayes v. Vessey*, 777 F.2d 1149 (6th Cir. 1986) (prison teacher injured by a third party and not by a state employee or official).

smoke filled room or shooting an innocent, mistaken suspect in the back three times was constitutional.

The court of appeals properly recognized that respondent is entitled to maintain this action and that defendants are not entitled to qualified immunity.

B. Respondent's Claim Under the Fourth Amendment Not Precluded By California's Workers Compensation Statute.

The court of appeals did not ignore the role of state administrative law as petitioners assert. [Pet. p. 13].

There is no authority for the proposition advanced by petitioners that a claim under the Fourth Amendment for an unreasonable seizure is precluded by potential recovery under the workers compensation laws. In fact, relevant authority is directly contrary to petitioners' preclusion argument. *See Maynard v. City of San Jose*, 37 F.3d 1396, 1405 (9th Cir. 1994). When the Fourth Amendment is violated, a plaintiff may invoke section 1983 regardless of the availability of a state remedy. *See Daniels v. Williams*, 474 U.S. 338 (1986) (Stevens, J., concurring) (citing *Monroe v. Pape*, 365 U.S. 167 (1961)); *see also McNeese v. Board of Education*, 373 U.S. 668, 672 (1963) (section 1983 is supplemental). The availability of state law remedies does not eliminate liability under section 1983 for use of excessive force. *See Smith v. Fontana*, 818 F.2d 1411, 1414 (9th Cir. 1983); *Sanders v. Kennedy*, 794 F.2d 478, 480-82 (9th Cir. 1986).

The Ninth Circuit's determination that this action is not preempted by the California's worker's compensation act should not be reviewed by writ. This Court does not grant certiorari to review matters of state law decided by federal courts of appeal. *Haring v. Prosise*, 462 U.S. 306, 314 n.8,

(1983) ("Standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review.").

The California Labor Code does not provide an exclusive remedy where an injured employee's claim implicates fundamental policy considerations such as violations of constitutional rights. *See Maynard*, 37 F.3d at 1405; *see also Soares v. Oakland*, 9 Cal. App. 4th 1822 (1992) (exclusive remedy no bar to action based on battery); *Gantt v. Sentry Ins.*, 1 Cal. 4th 1083 (1992) (public policy exception for constitutional claims). Thus, California state law recognizes that its workers compensation laws must bend to accommodate federal constitutional rights to recovery.

Finally, the City's reliance on *Calatayud v. State*, 18 Cal. 4th 1057 (1998), is misplaced. In *Calatayud* one officer was wounded when a shotgun held by another officer accidentally discharged. The officer in *Calatayud* was never a suspect and was not shot because he was considered a suspect. The City's concern that the decision in this case would create a federal right of action for the officer in *Calatayud* is imaginary.

Moreover, the specter of a speculative flood of cases is vastly overblown by petitioners. [Pet. pp. 17-19]. The City's conjectural arguments afford no basis for granting certiorari.

CONCLUSION

The decision below did not involve an important question of federal law which needs to be settled by this court. Nor has the Ninth Circuit decided a federal question in a way to conflict with applicable decisions of this court or of another court of appeals on the same issues.

The Ninth Circuit correctly upheld the trial court's determination that qualified immunity is inapplicable to these facts. The City's petition for a writ of certiorari should be denied.

Respectfully submitted,

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